

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

FERNANDO SANCHEZ,	)	NO. CV-F-10-2039 OWW
	)	(NO. CR-F-99-5103 OWW)
	)	
Petitioner,	)	MEMORANDUM DECISION AND
	)	ORDER DENYING PETITIONER'S
vs.	)	MOTION TO VACATE, SET ASIDE
	)	OR CORRECT SENTENCE PURSUANT
	)	TO 28 U.S.C. § 2255 AND
UNITED STATES OF AMERICA,	)	DIRECTING CLERK OF COURT TO
	)	ENTER JUDGMENT FOR
	)	RESPONDENT
Respondent.	)	
	)	
	)	

On October 22, 2010, pursuant to the mailbox rule, Petitioner Fernando Sanchez, proceeding *in pro per*, filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

Petitioner was charged in No. CR-F-99-5064 with two counts of illegal entry into the United States and one count of being a deported alien found in the United States. Petitioner was charged in No. CR-F-99-5103 with conspiracy to distribute and possess with the intent to distribute methamphetamine, cocaine

1 and heroin and with possession of methamphetamine with the intent  
2 to distribute. Petitioner pleaded guilty pursuant to a written  
3 Plea Agreement to being a deported alien found in the United  
4 States and to possession of methamphetamine with intent to  
5 distribute. Petitioner was sentenced on May 1, 2006 to 121  
6 months incarceration concurrent on these charges. No appeal was  
7 filed.

8 On July 7, 2008, Petitioner filed a Section 2255 motion  
9 directed solely to his conviction and sentence in No. CR-F-99-  
10 5064, i.e., being a deported alien found in the United States.  
11 See Dockets for No. CR-F-99-5064 OWW and No. CV-F-08-967  
12 Petitioner contended that he was denied the effective assistance  
13 of counsel because (1) "defense counsel misrepresented and  
14 misadvised the plea to defendant about the condition of his plea  
15 bargain when specifically enquired [sic] by defendant, in as much  
16 as counsel knew that defendant's whole behaviour [sic] and guilty  
17 plea was structured to avoid a plea agreement that would not  
18 result in a long sentence or prison time" and (2) defense counsel  
19 failed to argue for a downward departure as a consequence of  
20 Petitioner's status as a deportable alien. Petitioner further  
21 asserted that he was entitled to a downward departure for post-  
22 conviction rehabilitation pursuant to U.S.S.G. § 5K2.19. Because  
23 it appeared that Petitioner's Section 2255 motion was untimely,  
24 Petitioner, by Order filed on July 24, 2008, was ordered to file  
25 within 30 days an amended Section 2255 motion setting for the  
26 grounds upon which he sought relief and the facts upon which he

1 relied in contending that the motion was timely filed or that he  
2 was entitled to equitable tolling. Petitioner was advised that  
3 failure to timely comply would result in the dismissal of his  
4 Section 2255 motion as untimely. Petitioner did not comply with  
5 the Order and by Memorandum Decision and Order filed on September  
6 9, 2008, Petitioner's Section 2255 motion was dismissed as  
7 untimely. Judgment for Respondent was entered on September 17,  
8 2008. However, because the Clerk's Office did not enter  
9 Petitioner's address on the docket, Petitioner was not served  
10 with either of the Court's Orders until October 5, 2010.

11 In the instant motion, Petitioner asserts the following  
12 grounds:

13 (1) New constitutional law justifies a  
14 downward departure to the Sentencing  
Guidelines;

15 (2) The fast-track program permitting a four  
16 level reduction in the offense level for  
17 illegal aliens should have been applied at  
sentencing; and

18 (3) The Due Process and Equal Protection  
19 Clauses of the Fifth Amendment and the "Equal  
Rights" Act requires downward departure to  
the Sentencing Guidelines.

20 Section 2255 provides that a one-year period of limitation  
21 applies to a Section 2255 motion, which limitation period runs  
22 from the latest of:

23 (1) the date on which the judgment of  
24 conviction becomes final;

25 (2) the date on which the impediment to  
26 making a motion created by governmental  
action in violation of the Constitution or  
laws of the United States is removed, if the

1 movant was prevented from making a motion by  
2 such governmental action;

3 (3) the date on which the right asserted was  
4 initially recognized by the Supreme Court, if  
5 that right has been newly recognized by the  
6 Supreme Court and made retroactively  
7 applicable to cases on collateral review; or

8 (4) the date on which the facts supporting  
9 the claim or claims presented could have been  
10 discovered through the exercise of due  
11 diligence.

12 Applicable here is Section 2255(1). In *Calderon v. U.S. Dist.*  
13 *Court for Central Dist. of Cal.*, 128 F.3d 1283 (9<sup>th</sup> Cir.1997),  
14 *cert. denied*, 522 U.S. 1099 and 523 U.S. 1061 (1998), *overruled*  
15 *on other grounds*, 163 F.3d 530 (9<sup>th</sup> Cir.1998), the Ninth Circuit  
16 held that the one-year limitation period applicable to Section  
17 2255 motions is subject to equitable tolling. However, the Ninth  
18 Circuit further held:

19 Equitable tolling will not be available in  
20 most cases, as extensions of time will only  
21 be granted if 'extraordinary circumstances'  
22 beyond a petitioner's control make it  
23 impossible to file a petition on time ... We  
24 have no doubt that district judge's will take  
25 seriously Congress's desire to accelerate the  
26 federal habeas process, and will only  
authorize extensions when this high hurdle is  
surmounted.

*Id.* at 1288-1289.

As a general practice, the Court would require Petitioner to  
file an amended Section 2255 motion setting forth the grounds for  
relief and the specific facts upon which he relies in contending  
that the motion is timely filed or that Petitioner is entitled to  
equitable tolling. The Court does not follow that practice here

1 because, even if timely, Petitioner is not entitled to relief.

2       Petitioner pleaded guilty to possession of methamphetamine  
3 with intent to distribute, a conviction that carries a statutory  
4 mandatory minimum sentence of ten years (121 months). Petitioner  
5 also pleaded guilty to being a deported alien found in the United  
6 States, which carries a maximum sentence of twenty years. In the  
7 Plea Agreement, the United States agreed to recommend that the  
8 sentences for both convictions run concurrently, as opposed to  
9 consecutively. When Petitioner was sentenced in 2006, the  
10 Sentencing Guidelines were advisory pursuant to *United States v.*  
11 *Booker*, 543 U.S. 220 (2005). Nonetheless, except under specified  
12 circumstances not applicable here, the District Court has no  
13 discretion to depart below a statutory mandatory minimum  
14 sentence. See *United States v. Wipf*, 620 F.3d 1168 (9<sup>th</sup>  
15 Cir.2010); 18 U.S.C. § 3553(f). Although Petitioner's sentence  
16 for being a deported alien found in the United States was not  
17 subject to a mandatory minimum sentence, because Petitioner's  
18 sentence for that crime was imposed concurrently to the statutory  
19 mandatory minimum sentence of ten years (121 months),  
20 Petitioner's contentions that the Court could or should have  
21 departed downward on the grounds asserted by Petitioner are  
22 meaningless and do not entitle Petitioner to relief.

23       For the reasons stated:

- 24       1. Petitioner Fernando Sanchez's motion to vacate, set  
25 aside or correct sentence pursuant to 28 U.S.C. § 2255 is DENIED;  
26       2. The Clerk of the Court is directed to enter JUDGMENT FOR

1 **RESPONDENT .**

2 IT IS SO ORDERED.

3 **Dated: November 5, 2010**

**/s/ Oliver W. Wanger**  
UNITED STATES DISTRICT JUDGE